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No. 94-1892

In The

Supreme Court of the United States

October Term, 1994

ARMANDO DAMIAN, M.D. and DAMIAN CLINIC, INC.,

Petitioners,

vs.

CHARLES GALAYDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This civil lawsuit was filed by Respondent in 1989, pursuant to the law of the state of Ohio. Respondent alleged that Petitioners, Armando Damian, M.D. and Damian Clinic, Inc., negligently rendered medical care to him for injuries he sustained in an automobile accident on June 18, 1988. Respondent alleged that Petitioners' negligence caused him to suffer the severe and permanent destruction of his digestive tract, the loss of his left eye, and rendered him unable to work in his job as a telephone repairman.

In July of 1991, this action was tried to a jury in the Common Pleas Court for Cuyahoga County, Ohio. At the conclusion of the two week trial, the jury returned a unanimous verdict for Respondent. The jury awarded him $2,781,710 in compensatory damages, including past and future wage loss, medical expenses, and pain and suffering.

Prior to trial, Petitioner refused to engage in settlement negotiations with Respondent. Accordingly, at the close of trial, Respondent filed a motion requesting that the court order Petitioners to pay interest on the verdict from the date of his injuries through the date of the verdict. Under Ohio law, a person who tortiously injures another party is not generally obligated to compensate the injured party for interest on the judgment accruing from the date of the injury. Where the tortfeasor fails to make a good faith effort to settle the case, however, Ohio Revised Code §1343.03(C) provides that "[i]nterest on a judgment, decree or order . . . shall be computed from the date the cause of action accrued to the date on which the money is paid. . . ."

Pursuant to Revised Code § 1343.03(C), the trial court held a hearing, reviewed the evidence, and found that the Petitioners had failed to objectively and reasonably evaluate their risk of

being held liable for Respondent's injuries, and therefore had failed to make a good faith effort to settle Petitioner's claims. Accordingly, and pursuant to Ohio law, the court granted Respondent's motion for prejudgment interest.[1]

On appeal, Petitioners alleged that R.C. § 1343.03(C) violated their rights guaranteed by the Ohio Constitution. Both the Court of Appeals and the Ohio Supreme Court denied the appeal and affirmed the trial court's order granting Petitioner's motion for prejudgment interest. Petitioners now seek review by this Court, arguing, for the first time, that their federal due process rights have been violated. This argument is without legal support and does not warrant review by this Court.

REASONS FOR DENYING THE WRIT

I.

INTRODUCTION

There is no dispute that Petitioners' tortious conduct caused Respondent to suffer permanent, disabling injuries, or that during the pendency of this lawsuit the Petitioners failed to engage in good faith settlement negotiations with Respondent. These factual issues have been conclusively determined by the Ohio Supreme Court. Petitioners argue that the Ohio statute which requires that they compensate Respondent for the interest which accrued on the judgment from the time of the injury through the conclusion of trial raises an issue of due process under the United States Constitution.

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1. For some apparent "shock value," Petitioner has misstated the amount of the prejudgment interest award as equalling "$2,000,000." In fact, the prejudgment interest equals $983,886.56, upon which 10 percent per annum interest continues to run.

The Question Presented for Review by Petitioners is nothing more than an attempt to forge a federal constitutional question from an issue of state law. Moreover, Petitioners' contention was never argued to, or decided by, the Ohio Supreme Court. As such, they have waived their argument. Armando Damian and Damian Clinic Inc.'s Petition for Writ of Certiorari should be denied.

II.

PETITIONERS' DUE PROCESS ARGUMENT HAS BEEN WAIVED; IT WAS NEITHER ARGUED NOR PASSED UPON BY THE OHIO SUPREME COURT.

This Court's statutory authority to review federal issues arising in state court decisions is set forth at 28 U.S.C. § 1257. Interpreting § 1257, this Court has held that where the petitioner has failed to raise his federal claim in the state courts and the state supreme court has therefore failed to decide the issue, this Court is without jurisdiction to hear the case. *Webb v. Webb,* 451 U.S. 493, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981).

Moreover, this Court has repeatedly explained that where "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can show the contrary." *Street v. New York,* 394 U.S. 576, 582, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969); *see also, Fuller v. Oregon,* 417 U.S. 40, 50 n. 11, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974); *Chambers v. Mississippi,* 410 U.S. 284, 290 n. 3, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *Webb,* 451 U.S. at 495-496.

As Petitioners concede, the Ohio Supreme Court did not decide, or indeed even address, the federal due process claim Petitioners now raise.[2] The state court's omission creates a

2. *See* Petition, page 7, footnote 2.

rebuttable presumption that Petitioners failed to properly present the issue in the lower court. In point of fact, a review of Petitioners' Briefs to the Ohio Supreme Court confirms that they failed to present a federal constitutional issue to the Ohio court. Only once in Petitioners' 38-page Brief to the Ohio Supreme Court did they make reference to the Federal Constitution. That reference was contained in a parenthetical placed within a footnote which read:

> [T]he action of the trial court in imposing prejudgment interest deprived the defendants of a bundle of several related rights guaranteed by the Ohio Constitution: . . . the right to due process of law, Section 16, Article I (a right also guaranteed by the Fourteenth Amendment to the United States Constitution).

Page 22, footnote 8 of Brief of Appellant to the Ohio Supreme Court (21a, *infra*). Petitioners did not mention the Federal Constitution in their 21-page Reply Brief to the Supreme Court (37a-58a).

Petitioners now contend that their "challenge [in the Ohio Supreme Court] had expressly rested on both the Ohio and federal Constitutions." *Id.* This assertion is without merit. They did not argue to the Ohio Supreme Court that the application of Ohio Revised Code § 1343.03(C) violated their federal due process rights. Rather, their claim was based entirely upon the rights guaranteed by the Ohio Constitution.

This Court has consistently refused to "decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinal v. Louisiana*, 394 U.S. 437, 89 S. Ct. 1161, 22 L. Ed. 2d 398 (1969); *Webb*, 451 U.S. at 499; *Tacon v.*

Arizona, 410 U.S. 351, 93 S. Ct. 998, 35 L. Ed. 2d 346 (1973); *University of California Regents v. Bakke*, 438 U.S. 265, 283, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978) (opinion of Powell, J.). As this Court held in *Webb*, "at the minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *federal* Constitution was presented in the state courts and that those courts were appraised of the nature or substance of the federal claim." 451 U.S. at 501 (emphasis in original).

This case fails to meet these minimum requirements. The record confirms that the Ohio Supreme Court was not appraised of the nature or substance of the federal claim Petitioners now seek to assert. This Court should decline Petitioners' invitation to take judicial notice that a federal question might have been involved in the case, as this Court has consistently done in the past. *Yazoo and M.R. Co. v. Adams*, 180 U.S. 41, 21 S. Ct. 256, 45 L. Ed. 415 (1901). The Petition for Writ of Certiorari should be denied.

III.

THE DECISION OF THE OHIO SUPREME COURT INVOLVES ONLY ISSUES OF STATE LAW, AND THUS 28 U.S.C. § 1257 PROHIBITS THIS COURT FROM REVIEWING THE DECISION.

Section 1257 confers upon this Court the jurisdiction to review final judgments of state courts only where the validity of a state statute is being challenged on federal constitutional grounds. As Professor Moore has explained, however, "the right of review provided by § 1257 is not unlimited. The prerequisites for review under the section are designed to assure that the policy of achieving consistent decisions as to federal rights is fulfilled with the least possible federal intrusion into state judicial processes." 12 James W. Moore *et al.*, *Moore's Federal Practice*, ¶ 505.01 (2d ed. 1995).

The Ohio Supreme Court's decision involved only the interpretation and application of Ohio statutory law. Section 1257 does not confer upon this Court jurisdiction to review questions involving state law. "The State courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise." *Murdock v. City of Memphis,* 87 U.S. 590, 626 (1875).

In the present case, the Ohio Supreme Court examined Petitioners' conduct and concluded that Petitioners had failed to act in "good faith" within the meaning of Ohio Revised Code §1343.03(C). That the decision of the Ohio Supreme Court, interpreting this statute, may not be scrutinized by this federal court is well embodied in our dual system of jurisprudence. This Court must accept the "construction of the laws of the state by its highest court . . ." *Nickey v. Mississippi,* 292 U.S. 393, 396 (1933). Further:

> . . . [T]he courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State; ...this Court's power to review decisions of state courts is limited to their decisions on federal questions; and ... the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court.

Brinderhoff-Faris Co. v. Hill, 281 U.S. 673, 680 (1929).

Nevertheless, Petitioners attempt to skirt this venerable principle of Supreme Court Jurisprudence by attempting to fabricate a federal due process argument out of the Ohio Supreme Court's interpretation and application of Ohio law.

A. The Ohio Supreme Court's Interpretation Of Revised Code § 1343.03(C) Does Not Raise A Federal Issue, And Is Not SubjectTo Review By This Court.

Petitioners claim that Revised Code § 1343.03(C) deprives it of due process because the statute "punishes" defendants for exercising their right to judicial adjudication. To the contrary, the statute merely provides that a defendant that decides to take its case to a jury despite a high likelihood of an adverse judgment will be obligated to compensate the injured party for the interest incurred on the judgment from the date of the injury, while a defendant that objectively evaluates its risk and negotiates in good faith will not be so obligated. As Petitioner concedes that a statutory framework which would assess prejudgment interest against all defendants who lose at trial or who litigate a particular type of claim or who act in bad faith would contain no constitutional infirmities, Petitioners' due process claim is clearly without merit.

B. Ohio's Prejudgment Interest Statute Is Wholly Compensatory In Nature.

In their attempt to forge a federal question out of the Ohio Supreme Court's decision, Petitioners characterize the entire Ohio prejudgment interest framework as being punitive and one-sided. However, even cursory reflection upon the nature and policy supporting prejudgment interest reveals that prejudgment interest is wholly compensatory.

The Ohio prejudgment interest statute is an attempt by the

Ohio legislature to reconcile the conflict that develops between an injured party's right to full compensation and a tortfeasor's interest in having a judicial determination of its liability. When a tortfeasor injures a party, the right to compensation is immediate. Only one party, however, can "hold the money" and thus incur interest thereupon during the pendency of the litigation. Ohio law confers the right to do so upon the defendant, but only so long as he acts in good faith. Once it is determined that the defendant is liable to the plaintiff, and that the defendant has failed to negotiate in good faith during the pendency of the litigation, the defendant will then forfeit the interest he incurred upon the sum owed to the plaintiff. Ohio's statutory scheme of assessing prejudgment interest is neither punitive nor one-sided.

IV.

REVIEW UNDER 28 U.S.C. § 1257 IS LIMITED TO SUBSTANTIAL FEDERAL QUESTIONS.

In order to sustain this Court's jurisdiction under 28 U.S.C. § 1257, more than the mere form of a federal question must exist. *Cuyahoga River Power Co. v. Northern Ohio Traction & Light Co.*, 252 U.S. 388, 40 S. Ct. 404, 64 L. Ed. 626 (1920). The federal question must be substantial. *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390, 72 S. Ct. 842, 96 L. Ed. 1022 (1952). In past cases, a federal question has been considered insubstantial if it requires no analysis or exposition, or is clearly not debatable. *Hamilton v. Regents of University of California*, 293 U.S. 245, 55 S. Ct. 197, 79 L .Ed. 343, *rehearing denied*, 293 U.S. 633 (1934).

Accordingly, the appellate jurisdiction conferred upon this Court has traditionally been restricted to cases involving important constitutional issues, or to cases where there is conflicting authority and a need for uniformity is present. No

conflicting authority exists with regard to the constitutionality of Ohio Revised Code § 1343.03(C). In point of fact, no federal court has ever held that a statutory framework such as Revised Code § 1343.03(C) violates federal due process rights.

Further, this issue hardly falls into the realm of constitutional importance traditionally addressed by this Court. The plain facts indicate that petitioners were given access to judicial adjudication, neglected to act in good faith, and were thereafter obligated to forfeit the interest they incurred between the time of their tortious conduct and of their payment for the damages caused thereby.[3]

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3. Indeed, as the payment of the prejudgment interest award has been stayed pending appeal to this Court, Petitioner's petition has also unnecessarily delayed the payment of the interest to which the respondent is legally entitled.

CONCLUSION

This issue does not deserve further debate or analysis. Petitioners have not raised a substantial constitutional issue, and have therefore failed to raise a substantial federal question as required by 28 U.S.C. § 1257.

Respectfully submitted,

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APPENDIX A — EXCERPTS OF DEFENDANT'S BRIEF IN THE OHIO SUPREME COURT

STATEMENT OF FACTS
(including Statement of the Case)

This is an appeal in a medical malpractice action from a judgment holding the appellants (Armando B. Damian, M.D., and Damian Clinic, Inc.) liable to plaintiff, Charles Galayda, in the sum of $2,781,710, plus an award of prejudgment interest.

The action was commenced in the Court of Common Pleas for Cuyahoga County on April 27, 1989, and named as defendants the appellants together with several other physicians and medical service providers. The complaint alleged that the defendants had rendered negligent medical care to Galayda following his involvement in a near-fatal automobile accident. The action was tried to a jury over two weeks beginning on July 15, 1991. Prior to and during trial, the action was resolved favorably to several of the defendants by dismissal, summary judgment, or directed verdict.

At the conclusion of the trial, the jury returned a verdict in favor of three of the remaining defendants, and at the same time returned a verdict against appellants in the sum $2,781,710, consisting of $800,000 in present damages and $1,981,710 in future damages. The future damages included $1,396,125 for non-economic losses, and $585,585 for economic loss (Appendix, at p. 53, hereinafter "A. 53").

Following trial, the trial court granted plaintiff's motion for prejudgment interest (A. 61). The trial court denied all of defendants' post-trial motions, including a Motion for Periodic Payment of Future Damages under R.C. 2323.57, ruling that statute unconstitutional. (A. 54)

Appendix A

On appeal, the Court of Appeals for Cuyahoga County affirmed the trial court's judgment in its entirety, rejecting each of the appellants' assignments of error (A. 4). Appellants timely filed a notice of appeal to this Court from the judgment of the Court of Appeals, on the ground that the cause raises a substantial constitutional question and involves questions of great and general public interest (A. 1).

On January 19, 1994, the Court took jurisdiction. 68 Ohio St. 3d 1436. The cause is now before the Court for decision on the merits.

STATEMENT OF FACTS

Plaintiff, Charles Galayda, a 45 year old employee of Ohio Bell, was involved in an automobile accident in the early morning hours of June 18, 1988. Mr. Galayda was intoxicated, and he lost control of his vehicle and hit a tree. (Transcript, Vol. I, at 398, [hereinafter, "I, 398] IV, 1271)* Mr. Galayda's blood alcohol level was .15 when his blood was drawn at 3:45 a.m. at Lake Hospital. (IV, 1283.)

Plaintiff was examined by an emergency room physician, Efren Glorioso, M.D., at 3:30 a.m. in Lake Hospital. Dr Glorioso determined that plaintiff had pain in the chest and belly, as well as abrasions to the face and neck. (I, 427.) He ordered various blood tests and x-rays and contacted Mr. Galayda's family physician who instructed him to contact the surgeon who was on call. (IV,

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* Because none of the facts relating to the alleged malpractice are "necessary to be considered by the Court to determine the questions presented", S.Ct.R.Prac. Rule IV, Section 1, appellants did not include the trial transcript in the Record. Thus, citations are to the transcript. The testimony of Dr. Donald Fry, defendants' expert, is included in the record because it relates to Proposition of Law No. 3.

1217.) Glorioso contacted Dr. Damian, a board-certified surgeon, and spoke to him about 4:10 a.m. He informed Dr. Damian that the patient's vital signs were stable, but that he thought the patient had possible chest and abdominal internal injuries. (I, 437, IV, 1219.)

Dr. Damian arrived at the hospital about 5:40 a.m., having prepared for a long day at the hospital once he received Dr. Glorioso's call. (I, 454, IV, 1294.) He knew that Galayda's vital signs were stable and that various tests and x-rays were being taken, and, in fact, Galayda was constantly monitored until Dr. Damian's arrival. (I, 437, IV, 1219.)

Upon arriving at the hospital and evaluating the patient's condition, Dr. Damian discovered bleeding inside the abdomen and immediately scheduled Galayda for surgery. Dr. Damian did not transfer Galayda to Cleveland Metro General Hospital, a Level One Trauma Institution, because in his judgment the injuries were within the capabilities of Lake Hospital Systems and himself.

Shortly before surgery Galayda had a cardiopulmonary arrest, but was resuscitated by means of an emergency tracheostomy. (IV, 1300-03.) After his condition was stabilized, the surgery proceeded. Dr. Damian found 2,000 cc's (approximately 2 quarts) of blood within the abdominal cavity. After the blood was removed, Dr. Damian found lacerations of the liver and the diaphragm, bruising of the pancreas, and some bile staining in the area of the small intestine near the stomach, as well as other injuries. (IV, 1305-06.) Finally, the patient had an unstable chest in which several ribs were broken. (II, 540-J.)

Dr. Damian repaired the diaphragm with sutures. There were

deep lacerations, with multiple outbranchings, on the undersurface of the liver, close to where the bile ducts enter the surface of the liver. The lacerations were controlled with sutures. (IV, 1309.)

Dr. Damian then did a Kocher maneuver in which he visually examined the length of the common bile duct. (IV, 1309.) The examination did not disclose any injury to the duct. After completing the surgery Dr. Damian reinspected the bile duct and placed drains to drain fluid from the abdomen. (IVV, 1320, 1383.)

Despite the presence of bile staining, Dr. Damian did not perform an intraoperative cholangiogram (an injection of dye to map the functioning of the bile system) during the surgery. Dr. Damian testified that he did not do so because the procedure would have prolonged the surgery on a patient who was unstable throughout the operation, and because the bile staining was satisfactorily explained by the lacerations to Galayda's liver. (IV, 1321.)

Later on the day of the surgery, Dr. Damian took plaintiff back for a second surgery. At that time, he found that the arteries to the spleen were torn free from the spleen, and he removed that organ. Dr. Damian again visually examined the common bile duct and found no bile leaking from it. (IV, 1325-28.)

The following day, some bile-stained fluid began coming out of the drain tubes, a fact that Dr. Damian attributed to the lacerations of the liver which had cut into the bile ducts inside the liver. Plaintiff developed various complications during June 18 to July 1, including respiratory distress syndrome. (IV, 1328-30.) Two HIDA scans at Lake Hospital during that period did *not* show any bile outside of the bile duct. The bile drainage stopped

about July 1 and never reappeared throughout the admission at Lake Hospital. (IV, 1332.)

On July 6, Dr. Damian took Mr. Galayda back to surgery because of increasing abdominal pain and fever. In addition, a CAT scan showed formation of a pseudocyst in the pancreas, as well as multiple smaller cysts in the head of the pancreas. (IV, 1333.) Dr. Damian located the pseudocyst and also found blood and necrotic material near the tail of the pancreas, together with contusions to the body and tail of the pancreas. He drained the pseudocyst into the stomach. (IV, 1334-38.)

Mr. Galayda was transferred to Cleveland Metro on July 12 when he developed a high fever, a gastro-intestinal bleed and adult respiratory syndrome. (II, 533, V, 709.) Shortly thereafter, he was seen by Dr. Marc Eckhauser, who took Mr. Galayda to surgery on July 13 about 12 hours after an arteriogram had been performed at Metro by Dr. Cohen, a radiologist. (III, 810.) Dr. Eckhauser found a large volume of blood in the stomach, which appeared to be coming from where the pseudocyst had been connected to the stomach to drain. (III, 717.) A partial gastrectomy (removal of part of the stomach) was performed. (III, 758). At this surgery, Dr. Eckhauser also found bile staining beneath the liver. (III, 722.)

Dr. Eckhauser performed a second surgery on July 14 to remove a substantial amount of colon because it was necrotic and other parts did not have a good blood supply. (III, 724-25.)

On July 20, Dr. Cohen performed a percutaneous (injection through the skin) cholangiogram which showed a leak of bile from the common bile duct near the small intestine. (III, 728.) That same study showed a fluid collection in the liver which Dr.

Cohen attributed to a disruption of a bile duct within the liver. (IV, 980-81.)

On November 10, Mr. Galayda went home. Further surgery allowed him to eat normally. Dr. Eckhauser indicated at trial that Mr. Galaydas major problems now include abdominal pain, the required use of Zantac to reduce acid in the stomach, persistent diarrhea and a lack of muscle over the abdomen. (III, 766-70.)

Dr. Marc Shapiro, a surgeon from St. Louis, opined for plaintiffs that Dr. Damian did not act within acceptable standards of care in several respects. First, he indicated that Mr. Galayda should have been transferred sooner to a Level One Trauma Center. Second, according to Dr. Shapiro, Dr. Damian should have come to the hospital immediately after receiving the 4:10 a.m. telephone call from Dr. Glorioso. Third, he believed that an intraoperative cholangiogram should have been performed during each of Dr. Damian's three surgeries.

The second expert witness against Dr. Damian was Dr. Marc Eckhauser, Mr. Galayda's surgeon at Cleveland Metro. Dr. Eckhauser stated that he believed the leak from the common bile duct, discovered at Metro, was caused by the automobile accident and should have been discovered and corrected by Dr. Damian during his surgeries. (III, 729.) He testified that bile had spilled on Galayda's abdominal organs from the leak in the duct, and that the condition of the abdominal organs was directly attributable to the caustic effects of the bile. In Dr. Eckhauser's view, Dr. Damian should have performed intraoperative cholangiograms, which he believed would have disclosed the leak, even though Dr. Eckhauser himself did not do any cholangiograms during his own surgeries on Mr. Galayda. (III, 727, 744-45.)

Appendix A

Dr. Donald Fry, a board certified general surgeon from Albuquerque, New Mexico, testified as an expert witness on Dr. Damian's behalf. Dr. Fry is Chairman of the Department of Surgery at the University of New Mexico. (V, 1372-75; R. 92-95.) Dr. Fry testified that the injury to Mr. Galayda's common bile duct was in a location that would have been very readily visible with a Kocher maneuver. Thus, Dr. Damian would have identified the disruption to the duct, if it had been there at the time of the surgeries, even without performing a cholangiogram. (V, 1384-85; R. 104-05.) Dr. Fry further testified that it was not outside of the standard of care for Dr. Damian, in the exercise of medical judgment, to forgo an intraoperative cholangiogram because of the need to expeditiously complete the operations and because the liver lacerations were a satisfactory explanation for the bile staining. (V, 1387; R. 107.) Dr. Fry testified that common bile duct injury is a recognized risk of a distal gastrectomy, the surgery performed by Dr. Eckhauser. (V, 1410; R. 130.)

Dr. Fry further testified that the pancreative pseudocyst at the head of the pancreas identified by Dr. Damian was a result of the trauma sustained by Mr. Galayda in the automobile accident. (V, 1399; R. 119.) Dr. Fry testified that the pancreative injury and subsequent pseudocyst formations caused a clotting that impaired the supply of blood to the stomach and intestine, so that the organs did not receive blood and died. Thus, Dr. Fry testified, all of the complications suffered by Mr. Galayda flowed from his original injury in the automobile accident and were not the consequence of poor medical care and management. (V, 1412; R. 132.)

On the basis of this evidence, the jury returned a verdict for plaintiff. Defendants post-trial motions, including a motion for the court to establish a periodic payment plan, were overruled,

and judgment was entered on the verdict. On appeal by the defendants, the Court of Appeals affirmed the judgment.

ARGUMENT

PROPOSITION OF LAW NO. 1:

R.C. 2323.57, WHICH ALLOWS FOR PERIODIC PAYMENT OF A PORTION OF FUTURE DAMAGES IN CERTAIN CASES, IS CONSTITUTIONAL.

Following the verdict in this case, the defendants timely moved pursuant to R.C. 2323.57 for the approval of a periodic payment plan, since plaintiff's future damages exceeded $200,000. (R. 196.) The trial court denied the motion, holding that the statute violated the due process and jury trial guarantees of the Ohio Constitution (A-54). The Court of Appeals affirmed that holding on the same constitutional grounds.[1]

These decisions were mistaken. First, the courts below were wrong in concluding that the statute violates due process. To the contrary, the statute is a reasonable exercise of legislative power, rationally related to the legitimate objective of mitigating the inequities created by traditional lump-sum damages awards. (Proposition of Law I(A), below.)

Second, the courts below erred in holding the statute to be inconsistent with the constitutional right to a jury trial, since the provision for periodic payments regulates only the method of

1. The trial court also ruled that the statute is discretionary, not mandatory. The Court of Appeals correctly held that this ruling was mistaken (A. 34-37). The statute is by its terms plainly mandatory in those cases to which it applies.

enforcing judgments and does not affect at all the jury's constitutional and historic role in determining the amount of damages. (Proposition of Law Number 1(B), below.)

PROPOSITION OF LAW NUMBER 1(A):

STATE STATUTES ENJOY A STRONG PRESUMPTION OF CONSTITU-TIONALITY. A PARTY WHO CLAIMS THAT A STATUTE IS UNCONSTITU-TIONAL BEARS THE BURDEN OF SHOWING THAT THE STATUTE AND THE GOVERNING CONSTITUTIONAL PROVISIONS ARE CLEARLY INCOMPATIBLE. (*State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 128 N.E.2d 59, paragraph 1 of the syllabus, approved and followed.)

R.C. 2323.57 BEARS A REAL AND SUBSTANTIAL RELATION TO THE PUBLIC WELFARE, AND IS NEITHER UNREASONABLE NOR ARBITRARY. THE STATUTE DOES NOT VIOLATE THE DUE PROCESS PROVISIONS OF THE UNITED STATES OR OHIO CONSTITUTIONS. (*Mominee v. Scherbarth* (1986), 28 Ohio St. 3d 270, followed.)

The courts below held that R.C. 2323.57 is unconstitutional under the due process clause of the Ohio Constitution, Section 16, Article I, because, as those courts perceived it, the periodic payment statute lacks any rational relationship to its legislative objective. That conclusion was produced by an analysis that effectively, and mistakenly, required defendants to justify the statute, rather than requiring plaintiff to demonstrate its

unconstitutionality. Further, on its merits the holding is wrong: the statute clearly is a constitutional exercise of legislative power.

First, the courts below erred by requiring defendants to prove the constitutionality of the statute. That requirement ignores the settled rule that every statute is presumed to be constitutional, and a party claiming unconstitutionality can prevail only by showing that the statute and the governing constitutional provisions are clearly incompatible. See State ex rel. *Dickman v. Defenbacher* (1955), 164 Ohio St. 142, paragraph one of the syllabus.

This error in allocating the burden is reflecting in the text of the appellate court's opinion. Twice in that opinion, the court referred to the lack of evidence" to support the statute's constitutionality. Journal Entry and Opinion, at 34 (A. 38). By holding the statute unconstitutional in the perceived absence of evidence of its legitimacy, rationality, and effectiveness, the courts below effectively reversed the presumption of constitutionality that attaches to every statute.

This analytical error produced the erroneous conclusion that the statute is unconstitutional. Apart from this error in the allocation of burden of proof, however, the conclusions of the courts below are substantively wrong under the settled standard for evaluating acts of the General Assembly.

Legislative enactments do not violate the due process clause if they seek to advance a legitimate governmental objective and if the chosen means are rationally related to advancing the objective. *Granzow v. Bureau of Support* (1990), 54 Ohio St.3d 35. The inquiry is not whether the legislature acted wisely or

whether the members of a reviewing court would themselves have approved the legislature's chosen objective or means. *Sedar v. Knowlton Cosntr. Co.* (1990), 49 Ohio St.3d 193. A statute must be upheld, rather, when there exists "any conceivable set of facts under which the legislative scheme could be said to rationally further a legitimate objective. *Denicola v. Providence Hospital* (1979), 57 Ohio St. 2d 115, 119.

The courts below erred because they mistakenly deemed R.C. 2323.57 as intended primarily to reduce malpractice insurance rates. With that as the perceived objective, the courts then held that, under this Court's decision in *Morris v. Savoy* (1991), 61 Ohio St.3d 684, the periodic payment statute was an arbitrary or irrational means of attaining that end (A. 38).

Employing this crabbed analysis, the courts below utterly failed to recognize the range of purposes served by the statute. In enacting R.C. 2323.57 the legislature was undoubtedly responding in part to pervasive concerns about the widely-perceived crisis in medical malpractice litigation, and the dislocations that the perceived crisis was thought to portend. But the statute addresses far more than a narrow concern with malpractice insurance premiums.

As has long been recognized, the traditional method of enforcing tort liabilities — by entry and enforcement of lump-sum judgments — is often a deficient means of compensating injured parties for future losses.[2] Because lump-sum judgments are based on inherently uncertain projections of life expectancies

2. *See generally* Plant, *Periodic Payment of Damages for Personal Injury*, 44 La. L. Rev 1327 (1984); Henderson, *Periodic Payments of Bodily Injury Awards* (1980) 66 A.B.A.J. 734; Elligett, *The Periodic Payment of Judgments* (1979) 46 Ins Couns.J. 130 *See also Keeton & O'Connell, Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance* (1965) at 351-358; 2 (Cont'd)

and future losses, plaintiffs are inevitably over-or under-compensated in virtually all cases: the plaintiff with permanent injuries who outlives his life expectancy at trial receives less than he ought, and the plaintiff who dies sooner leaves a windfall recovery for his heirs.

Moreover, the inherently speculative nature of predictions about future economic conditions places a significant investment risk on the lump-sum recipient. Even when prudently handled, lump-sum awards for future losses are not necessarily adequate to defray actual costs over the lives of victims. Again, such an award undercompensates the victim when the trial expert's economic forecast proves to have been too conservative, and it creates a windfall if the actual return exceeds the projections on which the lump-sum award was based. Additionally, substantial evidence suggests that improvident expenditures and investments by injured parties frequently result in the dissipation of lump-sum awards before the injured party incurs the future medical expense or earnings loss that the award is intended to cover.[3]

(Cont'd)
Harper & James, The Law of Torts (1956) §25.2, at 1303-1304; Comment, *Variable Periodic Payments of Damages: An Alternative to Lump Sum Awards* 64 Iowa L.Rev. 138, 143-45 (1978).

3. See Plant, *supra*, 44 La. L. Rev. at 1327, *citing* Michigan Law Rev'n Comm'n, *Tenth Annual Report* (1975), at 129-130 (large lump-sum awards are "frequently" dissipated within a few years), J. Morgan, M. Snyder, & M. Sobel, *Lump Sum Redemption Settlements and Rehabilitation* (Univ. of Mich., 1959) (approximately 40% of lump-sum awards under worker's compensation statute were spent rather than invested for future medical needs and earnings replacement), *and* Choulos, *Structured Settlements*, Trial (Nov. 1980) at 74 (estimate that as many as 90% of lump-sum awards are dissipated by the recipients within fiveyears of receipt).

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Commentators who have documented these problems have consistently advocated periodic payment plans as a measure that would benefit both plaintiffs and defendants. Indeed, these proposals have been so widely embraced that in 1980, and again in 1990, the National Conference of Commissioners on Uniform State Laws approved a model or uniform "Periodic Payment of Judgments Act." And more than thirty state legislatures have adopted some provision for periodic payment of at least some classes of tort judgments. Nat. Conf. of Comm'rs on Uniform State Laws, *Uniform Periodic Payment of Judgments Act* (1990), prefatory note.

Thus, mitigating the deficiencies associated with traditional lump-sum judgments plainly is a legitimate legislative objective. Indeed, the General Assembly had not merely the power, but an affirmative duty, to adopt measures intended to improve the fairness and accuracy of compensation for those who are tortuously injured. See Section 16, Article I, Ohio Constitution (guarantee of remedy for injury).[4]

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4. The policy considerations set forth above amply justify the General Assembly's enactment of the periodic payment statute. In fact, however, the range of justifications is considerably more broad. The array of justifications that have led to the adoption of periodic payment statutes by state legislatures has been succinctly summarized by Commissioners on Uniform State Laws:

> The purposes of the Act remain the same — to compensate tort victims suffering bodily injury fully and fairly by requiring that certain awards for future economic damages be paid periodically as the losses accrue and thereby:
>
> (1) alleviate some of the problems inherent in calculating damage awards by eliminating the need to have the trier of fact discount uture damage awards to present value;

(Cont'd)

Appendix A

Similarly, periodic payment plans are indisputably a rational means of advancing the legislative objectives. As courts have repeatedly concluded in the face of constitutional challenges to periodic payment statutes, the statutes are a sensible way of matching compensation to actual losses over time, and of ensuring that money awarded by the jury to an injured plaintiff will be available when the plaintiff actually incurs the projected

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(Cont'd)

> (2) effectuate more accurate awards of damages for actual losses by paying health care costs for the actual life of the tort victim;
>
> (3) assure that payments of economic damages more nearly serve the purposes for which they are awarded;
>
> (4) reduce the burden on relatives of personal injury victims and public assistance costs created by the premature dissipation of lump-sum payments;
>
> (5) implement the income tax policies in the United States Internal Revenue Code and corresponding state and commonwealth tax laws by providing the same favorable income tax consequences to judgment creditors as are provided to claimants who enter into structured settlements; and
>
> (6) make the tort-liability insurance system more efficient so as to keep liability insurance available and affordable.

Nat. Conf. of Comm'rs on Uniform State Laws, *Uniform Periodic Payment of Judgments Act* (1990), prefatory note.

expenses or losses in the future. *See, e.g., Smith v. Superior Court* (Ariz. App. 1991), 831 P.2d 1279; *Bernier v. Burris* (Ill. 1986), 497 N.E.2d 763; *Florida Patients' Compensation Fund v. Von Stetina* (Fla. 1985), 474 So.2d 783; *American Bank & Trust Co. v. Community Hosp.* (Cal. 1984), 683 P.2d 670; *State ex rel. Strykowski v. Wilkie* (Wisc. 1978), 261 N.W.2d 434.[5]

Thus, the trial and appellate courts erred in concluding that R.C. 2323.57 is unconstitutional. The objectives of matching compensation to injury, and ensuring the ability of victims to

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5. Nor is the statute objectionable because it applies only to medical malpractice cases. This Court has repeatedly held that the General Assembly may legitimately address a problem "one step at a time," with partial solutions. *See*, e.g., *Granzow, supra*, 54 Ohio St.3d 35; *Sedar, supra*, 49 Ohio St.3d 193. "That the [periodic payment] provisions at issue here apply only in actions for medical malpractice is not fatal to the scheme, for '[t]he legislature need not choose between legislating against all evils of the same kind or not legislating at all. Instead it may choose to address itself to what it perceives to be the most acute need.' " *Bernier, supra*, 497 N.E.2d at 773, *quoting Chicago National League Ball Club, Inc. v. Thompson* (1985), 483 N.E.2d 1245. *See also American Bank & Trust Co. v. Community Hosp.* (Cal. 1984), 683 P.2d 670, 677, *quoting Williamson v. Lee Optical of Oklahoma* (1955) 348 U.S. 483, 489.

It is certainly rational to limit periodic payment orders to a class of tort cases in which large future damages awards are common and in which there is a high likelihood of insurance with which to fund the periodic payments. Far from being arbitrary, it is a common and eminently responsible legislative judgment to experiment with a novel legislative solution in a limited setting, and one in which it has its greatest chance of success. Similar prudence is widely evidenced in the law of other states. *See* Nat. Conf. of Comm'rs on Uniform State Laws, *Uniform Periodic Payment of Judgments Act* (1990), prefatory note (in the more than 30 states that have adopted periodic payment legislation, the most frequent legislative approach has been to limit the device initially to certain kinds of tort judgments, such as medical malpractice or products liability, with later legislation expanding its application to other kinds of civil recoveries).

meet actual future costs and losses, are proper legislative considerations. The promotion of structured settlements and other periodic payment schemes as a means of furthering those objectives bears a real and substantial relation to the objectives. Under no circumstance could a court conclude, under applicable standards, that the statute is unreasonable or arbitrary. It is constitutional, and the appellate court's judgment must be reversed.

PROPOSITION OF LAW NO. 1(B):

> **R.C. 2323.57 REGULATES ONLY THE WAY IN WHICH JUDGMENTS MAY BE ENFORCED AND DOES NOT INTERFERE WITH A PARTY'S RIGHT TO A JURY DETERMINATION OF DAMAGES. THE STATUTE DOES NOT VIOLATE THE CONSTITUTIONAL RIGHT TO JURY TRIAL. (*Lash v. Mann* 1943), 141 Ohio St. 577, paragraph three of the syllabus, applied and followed.)**

The periodic payment statute does not affect in any way an injured party's right to trial by jury. The appellate court's conclusion otherwise is manifestly wrong.

Undoubtedly, the determination of damages is properly a function for the jury in any case to which the right to jury trial attaches. R.C. 2323.57 does nothing, however, to remove the determination of damages from the jury; nor does it expand the judge's authority to alter that determination of damages.[6]

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6. Of course, the Civil Rules and common law provide the trial court (not the jury) with plenary control of its judgments, orders and decrees." *Schnitzler v. Lake*

(Cont'd)

The statute merely changes the manner by which a portion of future damages can be collected. "There is no vested right in an existing remedy and a statute may alter, modify or curtail an existing remedy." *Lash v. Mann* (1943), 141 Ohio St. 577, paragraph three of the syllabus. A party does not have a vested right "in the forms of administering justice that precludes the Legislature from altering or modifying them and better adapting them to effect their ends and objects." *State, ex rel. Michaels, v. Morse* (1956), 165 Ohio St. 599, 605-06.

True, the common law provided for award of both past and future damages through a lump sum judgment. But "[a] person has no property or vested interest in a rule of the common law. * * * The Constitution does not forbid the creation of new or the abolition of old common-law rights." *Phipps v. City of Dayton* (1988), 57 Ohio App. 3d 11, 14 *citing Duke Power Co. v. Carolina* Environmental Study Group, Inc. (1978), 438 U.S. 59. The determination of the damages that may be collected in a civil action is uniquely the function of the General Assembly. *Keaton v. Ribbeck* (1979), 58 Ohio St. 2d 443, 445.

Here, the legislature did not exercise even that broad power. Rather, it merely passed a law that empowers the court to order a periodic payment plan when requested by either party to do so. The court has broad discretion to fashion an appropriate plan, and is expressly authorized to "modify, approve, or reject any submitted periodic payments plan." R.C. 2323.57(D)(1)(d).

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Shore Coach Co. (Cuyahoga App. 1942), 41 N.E. 2d 436, 438, quoting Black on Judgments, Chapter IX, page 153. Thus, it is settled that the judicial power to grant a new trial on damages, or to order a conditional remittitur, does not offend the constitutional right to trial by jury. *Poske v. Mergl* (1959), 169 Ohio St. 70, 74.

Under the statute, the jury determines damages, and it determines the amount that is attributable to future losses; only the manner of collecting the portion of the award attributable to future damages in excess of $200,000 is subject to determination by the judge. Until a trial court adopts a plan under the statute, one cannot know the manner of collection. Conceivably, collection under a plan could be so attenuated or protracted, and thus bear so little relationship to the future damages determined by the jury, that it would, in effect, subvert the jury's determination. In such a case, a victim might have a constitutional challenge to the plan, but that would be, at most, to the statute *as applied.*

Here, the appellate court erroneously ruled the statute unconstitutional on its face, without any proof of how it has been applied, and without application in this case. The court's conclusion that on its face "R.C. 2323.57 * * * interferes with [plaintiff's] right to have damages determined by the jury, and therefore, his constitutional right to a trial by jury" (A. 41) is wrong.[7] Without a specific approved plan for the payment of plaintiff's future damages, no court could possibly assess whether the plan "interfered" with the jury's determination of damages.

The trial court's declaration that the statute is unconstitutional on its face was erroneous, as was its refusal to

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7. Under the statute, the jury determines both the plaintiff's entitlement to damages and the amount of damages. It was never a part of the jury's historical role to go beyond that and determine how and when the amounts should be paid, since those were matters governed by non-jury proceedings for the execution and enforcement of judgments. On its face, then, the statute cannot be said to invade the jury's province to any extent at all. *Accord: Bernier v. Burris* (Ill. 1986), 497 N.E.2d 763, 772; *American Bank & Trust Co. v. Community Hosp.* (Cal. 1984), 683 P.2d 670, 680-681.

enter a periodic payment plan. The appellate court's judgment, affirming the trial court's declaration, was also erroneous. It must be reversed.

* * * * *

In sum, the novel rulings of the trial and appellate courts in this case are wrong, and they depart vastly from this Court's established precedents regarding the proper scope of judicial review of legislative enactments.

If permitted to stand, the decisions below would greatly, and impermissibly, expand the power of reviewing courts to overturn the considered judgments of the legislature in the exercise of its time-honored power to enact legislation in furtherance of the public good. That encroachment on legislative power is the product of the appellate court's substantive errors regarding the identification of permissible legislative objectives and the evaluation of the legislature's judgment as to how to further those objectives. The encroachment is aggravated, moreover, by the appellate court's error in treating statutes as presumptively unconstitutional, subject to invalidation unless a trial court is convinced of their constitutionality.

These holdings are incompatible with the elemental precepts of separation of powers and judicial review that are at the core of our constitutional system. In addition, the decisions below require reversal because they struck down a statute that reflects a seasoned, sensible judgment about how victims of medical malpractice can most effectively and fully be compensated for their injuries. Superficially, the rulings may appear to protect victims' rights, and that is how they were couched by the courts below. In truth, though, the rulings eliminate a carefully

considered and thoroughly supported legislative judgment that periodic payment plans protect victims by ensuring their ability to survive their losses and defray the costs caused by their injuries.

Reversal is likewise required as to the mistaken decision of the courts below that the statute violates the right to trial by jury. Periodic payment plans do not operate as a cap on damages, nor do they deprive injured persons of access to damages awarded by the jury, or in any other way interfere with the constitutional right to have a jury assess damages.

Under the statute, malpractice plaintiffs receive immediately *all* past and present damages, both economic and non-economic. They also receive the first $200,000 of future damages, because the statute applies only in cases in which such damages exceed that amount. And, as to the balance of future damages, there is nothing in the statute that prevents a court from affording the injured party the full monetary value of the jury's award. To the contrary, the statute, although mandatory in requiring entry of a payment plan, preserves the trial court's discretion to fashion an appropriate plan for future payments. The actual effect of the statute on a particular plaintiff depends on the specific plan approved by the trial court. It is not facially unconstitutional.

The lower courts' severe departure from the proper regard to be paid legislative enactments, a departure that invalidated a considered measure addressed to matters of important public concern, cannot be permitted to stand.

Appendix A

PROPOSITION OF LAW NO. 2

THE CONSTITUTION PROHIBITS THE AWARD OF PREJUDGMENT INTEREST UNDER R.C. 1343.03 AGAINST A DEFENDANT WHO EXERCISES HIS CONSTITUTIONAL RIGHT TO TRIAL BASED ON A GOOD FAITH, OBJECTIVELY REASONABLE BELIEF THAT HE IS NOT LIABLE. A PARTY'S BELIEF THAT HE IS NOT LIABLE IS OBJECTIVELY REASONABLE AS A MATTER OF LAW IF REASONABLE MINDS COULD DIFFER AS TO LIABILITY. (Kalain v. Smith [1986], 25 Ohio St. 3d 157 approved and followed.)

The award of prejudgment interest in this case deprived defendants of their constitutional right to trial by jury.[8] As a matter of law, defendants had a good faith, objectively reasonable belief that they were not liable. Their defense was supported by competent expert testimony and it was sufficient to create a jury issue as to liability.[9] By definition, then, reasonable minds could have concluded that defendants were not liable. That is precisely what defendants here concluded, and why they chose to exercise

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8. More precisely, the action of the trial court in imposing prejudgment interest deprived the defendants of a bundle of several related rights guaranteed by the Ohio Constitution: the right to trial by jury, Section 5, Article I, the right to due process of law, Section 16, Article I (a right also guaranteed by the Fourteenth Amendment to the United States Constitution), and the right of access to the courts, Section 16, Article I. *Cincinnati, H. & D. R. Co. V. Sullivan* (1877), 32 Ohio St. 152.

9. Plaintiff did not move for a directed verdict on liability. He would not have been entitled to one, nor to a judgment n.o.v. if the jury had determined that the defendants were not liable.

their constitutional right to try the question of their liability. The imposition of prejudgment interest under these circumstances impermissibly penalized defendants for their exercise of that right.

Specifically, as described in part (A), below, because the sanctions authorized by the statute are punitive and one-sided, they cannot constitutionally be imposed on a non-settling defendant who has a good faith and objectively reasonable belief that he is not liable, and therefore exercises his constitutional right to trial by jury. This Court's holding to that effect in *Kalain v. Smith* (1986), 25 Ohio St. 3d 157, syllabus, is constitutionally compelled.

Due to this constitutional basis, as described in part (B), below, the *Kalain* holding permits the imposition of prejudgment interest only in those cases where reasonable minds could not differ as to the non-settling defendant's liability: in those cases, there is no constitutional right to trial and the statute's sanctions do not operate to punish the exercise of the right. Thus, as described in part (C), below, the imposition of sanctions in this case was unconstitutional, since as a matter of law reasonable minds could have differed over the defendants' liability, and the defendants' exercise of their constitutional right to trial could not lawfully be punished.

Finally, as described in part (D), below, quite apart from these constitutional considerations, the imposition of prejudgment interest in this case was improper because it materially departed from the standard established in *Kalain*. By imposing prejudgment interest on the ground that the plaintiff had a better than "nonexistent" or "marginal" chance of

prevailing, the courts acted on a fundamentally erroneous view of the showing required to warrant an award of prejudgment interest.

A. The Holding in *Kalain v. Smith* is constitutionally compelled.

In *Kalain v. Smith* (1986), 25 Ohio St. 3d 157, syllabus, this Court established the standards for award of prejudgment interest under R.C. 1343.03(C). Those standards place the focus on the defendant's unnecessary attempts to delay the proceedings and on the parties' conduct in discovery and regarding settlement. Critically, this Court held in the final sentence of the syllabus that "[i]f a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer." *Id.*

This sentence is constitutionally compelled. Without the limitation it supplies, the statute would unconstitutionally penalize litigants for the good faith exercise of a constitutional right. If a party chooses to try, rather than to settle, a case, that choice is constitutionally protected unless it is made in bad faith. This Court recognized this point in *Kalain* itself, construing the statute to protect the good faith exercise of the right to trial. That construction was necessary to preserve the statute's constitutionality.

A State may legitimately encourage settlement by means of various incentives. Ohio's prejudgment interest statute is among those incentives. As compared with the settlement incentives of other states, and with other prejudgment interest rules adopted in Ohio, however, this statute is unique. It is unique, first, in that it

imposes liability for pretrial settlement conduct only on defendants. It is unique, further, in that its sanction is punitive rather than compensatory — liability for prejudgment interest under the statute is calculated as a percentage of the judgment from the date of injury, without regard to the losses caused by the failure to settle. These features set R.C. 1343.03(C) apart from other statutes regarding prejudgment interest, which are compensatory in form and effect; and they set the statute apart from other statutes that impose incidental burdens on the exercise of constitutional rights because the imposition of this punitive burden, or sanction, on the exercise of the right to trial is not merely incidental but central to the statutory scheme. The statute's object, that is, is to dissuade resort to trial, not by compensating the other party or the state for the cost of exercising the right, but rather by punishing the non-settling party for having gone to trial.[10]

These unique features of the Ohio statute are problematic; each runs perilously close to rendering the statute facially unconstitutional. Those difficulties are avoided, and the statute is saved from facial unconstitutionality, only by the critical final sentence of the syllabus in *Kalain*.

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10. The punitive character of the Ohio statute is most obvious when the statute is compared to the similar statutory settlement incentives of other states. Under Ohio's scheme, interest runs from the date of the injury, without regard to when the non-settling party should have settled. Under the laws of other states, interest or similar costs begin to accrue only on or after the date that a settlement offer was unreasonably refused, a difference in timing directly related to an intent to compensate the other party for the delays caused by litigation. *See, e.g.*, Col Rev. St § 13-17-202; Conn. Gen St. Ann. § 52-192a; Fla St. Ann. § 45.061; Id. Code § 12-301; Minn. St. Ann. § 549.09; Mo. St. Ann. § 408-040; Nev. St. Ann. §17.115.

Appendix A

1. Punitive sanctions cannot punish exercise of constitutional rights.

Punitive measures of the kind imposed by the prejudgment interest statute are not inherently unconstitutional. They are permissible if directed at conduct that can lawfully be punished, such as deliberate, bad faith delay of litigation. In contrast, such measures are unconstitutional if they are imposed to punish the exercise of a constitutional right — here, the right to trial by jury, and, more broadly, the right to trial and of access to courts. *Shapiro v. Thompson* (1969), 394 U.S. 618, 631 *quoting United States v Jackson* (1968), 390 U.S. 570, 581 ("If a law has 'no other purpose * * * than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.' "); *State ex rel. Christian v. Barry* (1931), 123 Ohio St. 458, syllabus.

2. Punitive sanctions cannot be one-sided.

The prejudgment statute is also problematic because it is one-sided; that is, only defendants bear the risk of sanction for failure to settle. A plaintiff who makes no effort to settle, and who loses no sanction under R.C. 1343.03(C). In contrast, a defendant who makes no effort to settle faces the palpable, and often severe, sanction of an award of prejudgment interest on the entire judgment.

This disparity offends the equal protection guarantees of the United States and Ohio Constitutions. Because the classification affects a fundamental right — the right to trial — it is subject to strict scrutiny. *Shapiro v. Thompson, supra*, 394 U.S. 618; *State v. Lane* (1979), 60 Ohio St. 2d 112, 115, 122 ("the mere possibility of deleterious effects on fundamental rights calls for close

judicial scrutiny"); *Board of Ed. v. Walter* (1979), 58 Ohio St. 2d 368, 373-74. There is no compelling governmental interest that can support the disparate treatment of plaintiffs and defendants with respect to their conduct regarding settlement. Thus, unless the statute is given a saving construction that limits its application to situations in which punishment is permissible — e.g., where a defendant lacks a reasonable basis for proceeding to trial — it offends the constitutional guarantees of equal protection.

In sum, the final sentence of the *Kalain* syllabus is constitutionally required. As this Court recognized in *Kalain*, a defendant cannot constitutionally be penalized for going to trial unless he does so in bad faith.

B. The Constitution requires that R.C. 1343.03(C) be interpreted to preclude prejudgment interest in cases in which liability is properly submitted to the jury for adjudication.

The constitution requires that the final sentence of the syllabus in *Kalain* be applied to ensure that the constitutional rights to trial and to trial by jury are not denied. This can be done only if awards of prejudgment interest under R.C. 1343.03(C) are limited to cases in which penalizing the defendant's failure to settle does not penalize the exercise of a constitutional right. That is possible, however, only if awards of prejudgment interest are limited to cases in which the defendant is not entitled to a jury determination of liability; that is, cases in which the defendant cannot withstand a motion for summary judgment or for a directed verdict on the issue of liability.

In such cases, the law concludes that, based on the evidence, no reasonable person could find in favor of the defendant. Thus,

in such cases, there is no constitutional right to insist on a trial or on by jury. *Carter-Jones Lumber Co. v. Ebler* (1958), 167 Ohio St. 189, 207. In such a case, the imposition of a punitive sanction for nonetheless proceeding to trial does not impair or punish the exercise of a constitutional right.

If, on the other hand, the defendants case survives a motion for directed verdict, or could have survived one had it been made,[11] then prejudgment interest under the statute cannot constitutionally be awarded. Under such a circumstance, by definition, the defendant's belief that he is not liable is objectively reasonable: if a reasonable juror could find for the defendant, then the defendants belief in his non-liability is, *a fortiori,* reasonable. Thus, awarding prejudgment interest against a defendant who goes to trial in a case in which the defendant survives, or could have survived, a motion for directed verdict impermissibly penalizes the constitutionally protected right to trial by jury.

C. The Award of Pretrial Interest in this Unconstitutional.

In this case, as a matter of law, defendants had a good faith, objectively reasonable belief that they were not liable. The issue of liability was properly submitted to the jury, and, therefore, by definition, reasonable minds could differ as to liability. Under that circumstance, defendants' assertion of their right to trial is constitutionally protected, and cannot be punished. The award of prejudgment interest in this case is unconstitutional.

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11. This conditional clause is essential, because, without it, the constitutional rule could be circumvented by plaintiffs merely by declining to move for a directed verdict on liability.

D. Even without reaching the constitutional question, the award of prejudgment interest in this case must be reversed because the trial court applied a standard materially at variance with *Kalain*.

The trial court failed to apply the standard of *Kalain v. Smith*. Instead, it observed that it "would be proper for a defendant to decline to make a settlement offer where a reasonably prudent trial lawyer would consider the probability of plaintiff's success to be nonexistent, or barely marginal at best. It is not prudent, however, to ignore the obvious and apparent adverse consequences of all the evidence and fail to rationally assess risks which are reasonably apparent." *Trial Court's Journal Entry and Opinion*, at 13-14 (A. 73-74).

Under the trial court's novel standard, a defendant is subject to an award of prejudgment interest for going to trial unless the chance of liability is "nonexistent, or barely marginal at best." Leaving aside the constitutional considerations that compel the conclusions advanced above, the trial court's standard is a material and impermissible departure from the settled law of this State as set forth in the syllabus of *Kalain*. On that ground alone, the trial court's judgment on prejudgment interest was erroneous, and the appellate court's affirmance of that judgment must be reversed.

* * * * *

This Court has consistently, and with increasing frequency in recent years, been called upon to protect the right to trial by jury from legislative erosion.[12] This case presents the Court with

12. *See e.g., Fantozzi v. Sandusky Cement Prod* (1992), 64 Ohio St. 3d 601; *Kneisley v. Lattimer-Stevens Co.* (1988), 40 Ohio St. 3d 354; *Id.* at 357-58 (Cont'd)

the occasion and necessity of exercising that vigilance once again, to protect this indispensable right from the subtle and impermissible erosions wrought by improper awards of prejudgment interest. This Court must reverse the judgment below and affirm resoundingly that the sanctions of prejudgment interest are appropriate in certain carefully delineated circumstances, but that they may not constitutionally be applied against parties who in good faith exercise their constitutional right to trial by jury.

PROPOSITION OF LAW NO. 3

ON QUESTIONS OF CAUSATION, AN EXPERT MEDICAL WITNESS MAY TESTIFY IN TERMS OF POSSIBILITIES, AND THE EXPERT'S TESTIMONY IS NOT INADMISSIBLE ON THE GROUND THAT THE EXPERT HAS NOT TESTIFIED TO CAUSATION IN TERMS OF A MEDICAL CERTAINTY OR PROBABILITY. (*State v. D'Ambrosio*, (1993), 67 Ohio St.3d 185, approved and followed: Evid. R. 702 applied.)

At trial, defendants offered the testimony of Donald Fry, M.D., a board certified general surgeon who is the Chairman of the Department of Surgery at the University of New Mexico. Dr. Fry would have testified that the injuries to plaintiff's bile duct could have been caused by the placement of surgical clips during the gastrectomy surgery, after plaintiff had left the defendants'

(Cont'd)

(*Douglas*, J., concurring). *See also Miller v. Wikel Mfg. Co.* (1989), 46 Ohio St. 3d 76, 81 (Douglas, J., concurring and dissenting) *Morris v. Savoy, supra*, 61 Ohio St. 3d 684, 700 (Sweeney, J., concurring and dissenting).

care.[13] In particular, Dr. Fry would have testified: that the site of the bile leak was in "a high probability" for common bile duct injury during gastrectomy surgery; (R. 80-81.) that the surgery was a logical explanation for the injury; and that it was impossible to say, within a reasonable medical certainty, where the leak came from. (*Id.*)

The trial court excluded this evidence on the ground that Dr. Fry could not identify the surgery as the cause of the injury to "a reasonable medical certainty." The Court of Appeals affirmed. The exclusion of the testimony was reversible error.

First, as this Court held in *State v. D'Ambrosio* (1993), 67 Ohio St.3d 185, 191, there is no requirement in Ohio law that expert medical testimony be stated in terms of probabilities or certainties. Questions of probability or certainty, as the Court held, go to the sufficiency of evidence, rather than to its admissibility, and a single item of evidence need not be in itself sufficient to prove a fact in order to be admissible. The test of admissibility is, rather, simply whether the expert's testimony will " 'assist the trier of fact to understand the evidence or to determine a fact in issue.' " *Id.*, quoting Evid. R. 702.[14]

Here, testimony as to possible causes of plaintiff's bile duct injury, other than that claimed by plaintiff, was obviously

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13. Dr. Fry's deposition was taken five months before trial. It is included in the Record. (R. 1-91.)

14. *D'Ambrosio* was a criminal case, and in its opinion the Court noted that a requirement of expert medical certainty was inappropriate "especially" in criminal cases. Nothing in the decision suggests, however, that the rule is *limited* to criminal proceedings. Indeed, the sole prior decision cited by the Court was a civil case, and, more importantly, the decision rested on the provisions of Evid. R. 702, which is equally applicable in both criminal and civil proceedings. *See* Evid. R. 101(A).

relevant and it would have assisted the jury in evaluating the weight to be given the testimony of plaintiff's expert regarding causation. The exclusion of the testimony solely because it failed to meet a non-existent standard of "medical certainty" was wrong.

Second, even if the rule were as the courts below thought it to be, it would not have applied to Dr. Fry's who bears the burden of proof on the issue as to which the expert testifies.[15]

This limitation of the "medical certainty" rule follows inevitably from the theory of the rule as one based on evidentiary sufficiency:

> The very reason that [possibility] testimony cannot be introduced by a plaintiff is that it is not probative inasmuch as it does not carry plaintiff's burden of proof. If a plaintiff introduces only possibilities to show causation, as a matter of law he has not met his burden of proof, but a defendant in a case

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15. *Giles v. Yellow Cab Co.* (1964), 1 Ohio App.2d 404, 407-408 (error to prevent defendant's cross-examination of expert as to whether plaintiff's injury might have been caused by arthritis, rather than by collision as plaintiff claimed); *Davis v. Sugardale Foods, Inc.* (February 24, 1982), Stark County App. No. CA 5792, unreported (A. 87) (not error to permit defense expert to testify as to other possible causes of the plaintiff's injury); *Conti v. Topolosky* (June 17, 1975), Franklin County App. No. 74AP-515, unreported (A. 79) (defense expert may testify to possible other causes). Other jurisdictions that adhere to a "reasonable medical certainty" rule for expert testimony similarly limit the rule to proofs offered by the party with the burden on the issue to which the testimony relates. *See, e.g., Dolan v. Carrier Corp.* (Pa. Super. 1993), 623 A.2d 850, 853; *Felde v. Kohnke* (1971), 184 N.W.2d 433, 441, 50 Wis.2d 168.

> does not have the burden of proof. The burden of proof was always on the plaintiff . . . , which burden never shifts during a trial. The defendant . . . did not have to prove anything. The burden is upon the plaintiff to attempt to meet her burden of proof; the defendant need simply to weaken plaintiff's attempt to meet the burden of proof. If a malpractice plaintiff has introduced evidence to show the probability of the occurrence of an event, a malpractice defendant need not be limited to showing probability that the event did not occur; instead, the malpractice defendant may be allowed to demonstrate that such probability as shown by plaintiff is neither a certainty, nor a great probability, and defendant may attempt to do this by using "possibility" evidence to chip away and destroy the evidence set forth by plaintiff.

Conti v. Topolosky, supra. See also Davis v. Sugardale Foods, Inc., supra ("There is a substantial difference between the burden imposed by the law upon a plaintiff to prove cause and affect by probability and the admissibility of evidence to refute the weight and sufficiency of such evidence.").

It would be entirely inconsistent with the idea of burdens of proof to apply the rule to require that a defendant show the *probability* of some other cause as a means of attacking the weight or sufficiency of the plaintiff's evidence on an issue. Such a rule would effectively place on the defendant the burden of disproving a matter as to which the plaintiff has the burden of

proof. Indeed, a rule that required "certainty" evidence from the defendant would arbitrarily deny the defendant an opportunity to impeach or rebut the plaintiff's case, and would amount to a denial of due process of law.

Thus, even under a "medical certainty" rule, a defendant is not limited to "certainty" evidence in rebutting the proof offered in plaintiff's case; rather, he may attack the plaintiff's case with proof of other possibilities. In the present case, then, even if the "medical certainty" rule governed expert proofs in Ohio, the courts below were mistaken in applying the rule to the testimony of Dr. Fry. The testimony was offered to rebut plaintiffs evidence as to the supposed cause of his injury, a matter as to which plaintiff bore the burden of proof, by raising the possibility of other causes of the injury. As such, the testimony was entirely within the settled rule that expert evidence of possibilities may be introduced to attack the weight or sufficiency of the "medical certainty" evidence on which the plaintiff relies.

While seeming to acknowledge this long-settled rule, the Court of Appeals effectively eviscerated it by relying on a nonsensical distinction between (a) evidence contradicting or impeaching the specific cause testified to by the plaintiff's experts (admissible in the appellate court's view as "possibility" evidence), and (b) evidence of a different cause (which the court held subject to the "probability" standard). (A. 26-28). Not surprisingly, the appellate court cited no authority adopting this purported distinction. Ohio law is, in fact, to the contrary.[16]

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16. *See, e.g., Giles, supra* 1 Ohio App.2d at 407-408, 205 N.E.2d at 88-89 (error to exclude evidence that injury was possibly caused by arthritis rather than by collision). In this case, the Court of Appeals employed its invented distinction in an effort to distinguish *Conti v. Topolosky, supra,* stating that *Conti* had permitted "possibility" evidence only to refute the plaintiff's claimed cause and not to show

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Appendix A

The appellate court's claimed distinction is in fact nonexistent. Certainly evidence of a possible cause other than that advanced by the plaintiff does two things at once: it tends to prove a different cause, and it tends to reduce the likelihood of plaintiff's claimed cause. The chief probative value of "other cause" evidence, however, and therefore the reason for its admissibility, is that it undermines the persuasive force of the plaintiff's evidence regarding cause. Thus, when offered by a defendant, there is only a semantic difference between the two forms of the statement: "the bile duct injury might not have been caused by the accident," and "the bile duct injury might have been caused by the later surgery." In either form, the essence of the statement is that it attacks the sufficiency of the plaintiff's evidence regarding cause.

Moreover, the distinction manufactured by the appellate court is inconsistent with the fundamental law of burdens, since it effectively places on the offering defendant the burden of disproving the plaintiff's claimed cause by proving the existence of a different cause. A defendant offering an alternative cause is not required to prove the alternative cause: he may introduce any evidence that undermines the weight of the "certainty" evidence introduced by the plaintiff.

Finally, even if it made sense, the appellate court's specious distinction would have been inapplicable to Dr. Fry's testimony anyway. Dr. Fry would have testified that it was "impossible" to say to a "reasonable medical probability" what had caused

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other possible causes. That description of *Conti* is, however, flatly inconsistent with the *Conti* opinion itself. *See Conti* (the party without the burden of proof may " 'attempt to upset [the plaintiff's] proof by showing *other relevant possibilities*' ") (emphasis added), *quoting Hernke v. Northern Insurance Co.* (1963), 20 Wis. 2d 352 at 360, 122 N.W. 2d 395 at 399-400.

plaintiff's bile duct injury. That testimony directly contradicted the testimony of plaintiff's expert that the accident could be identified as the cause to a reasonable medical certainty. Thus, even if testimony of the possibility of other causes were inadmissible, Dr. Fry's testimony denying the certainty of any cause (including the cause claimed by plaintiff) would have been admissible.

The exclusion of Dr. Fry's testimony was erroneous under any putative basis. The exclusion was highly prejudicial to the defendants, since it denied them an opportunity to defend on an issue that was central to their liability. This Court should correct the error and reaffirm the correct governing principles in this important area of the law of evidence.

CONCLUSION

The courts below erroneously ruled R.C. 2323.57 unconstitutional. The error was caused by a grave expansion of judicial power that led to the nullification of a thoroughly considered statute rationally designed to promote a well-documented problem of public policy. That error must be corrected. The judgments below must be reversed and the cause remanded with instructions to adhere to the mandate of R.C. 2323.57.

The courts below also applied the Ohio prejudgment interest statute in a manner that violated the defendants' right to trial by jury. That constitutional deprivation must be corrected, and the judgment imposing prejudgment interest reversed.

Finally, because the lower courts misapplied settled Ohio evidentiary law, to the material prejudice of defendants, the

judgment of liability must be reversed, and the cause remanded for new trial.

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APPENDIX B — EXCERPTS OF DEFENDANT'S REPLY BRIEF IN THE OHIO SUPREME COURT

ARGUMENT

PROPOSITION OF LAW NO. 1:

THE STATUTE PROVIDING FOR PERIODIC PAYMENT OF CERTAIN JUDGMENTS, R.C. 2323.57, IS CONSTITUTIONAL.

The trial court and the Court of Appeals in this case held that Ohio's periodic payment statute (R.C. 2323.57) violates the due process and jury trial guarantees of the Ohio Constitution. In attempting to defend these holdings, plaintiff (joined by amicus curiae) relies on the same flawed due process and jury trial theories that misled the courts below. In addition, plaintiff attacks the statute as a denial of equal protection, a ground that was not relied on by either of the courts below. Both plaintiff and amicus do contend, however, that the standard to be applied under the equal protection clauses is essentially the same as the standard under a due process analysis. *Brief of Plaintiff-Appellee,* ("Br.") at 24; *Brief of Amicus Curiae,* at 11-12. For that reason, the due process and equal protection claims are addressed together, under Proposition of Law 1(A) below (which is amended to reflect the equal protection issue). As in defendant's original Brief, the arguments regarding the right to jury trial are discussed under Proposition 1(B).[1]

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1. Amicus raises as a separate claim the proposition that the statute violates the Ohio constitutional proibition of legislatively created "special privileges". Ohio Const., art. I, § 2. This contention is not properly before the Court because it was not raised by any of the parties in any stage of the proceedings below and the claim has therefore not been preserved.

On its merits, the proposition is silly on its merits. The constitutional

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Appendix B

PROPOSITION OF LAW NUMBER 1(A):

STATE STATUTES ENJOY A STRONG PRESUMPTION OF CONSTITUTIONALITY. A PARTY WHO CLAIMS THAT A STATUTE IS UNCONSTITUTIONAL BEARS THE BURDEN OF SHOWING THAT THE STATUTE AND THE GOVERNING CONSTITUTIONAL PROVISIONS ARE CLEARLY INCOMPATIBLE. (*State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 128 N.E.2d 59, paragraph 1 of the syllabus, approved and followed.)

R.C. 2323.57 BEARS A REAL AND SUBSTANTIAL RELATION TO THE PUBLIC WELFARE, AND IS NEITHER UNREASONABLE NOR ARBITRARY. THE STATUTE DOES NOT VIOLATE THE DUE PROCESS OR EQUAL PROTECTION PROVISIONS OF THE UNITED STATES OR OHIO CONSTITUTIONS. (*Mominee v. Scherbarth* (1986), 28 Ohio St. 3d 270, followed.)

Plaintiff advances his due process and equal protection claims with essentially three lines of argument: *First*, he claims

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provision in question provides that "no special privileges or immunities shall ever be granted, *that may not be altered, revoked or repealed by the General Assembly*" (emphasis added). The provision is plainly addressed to directly legislated corporate charters, franchises and the like (a common practice in the nineteenth century). It simply assures that no Assembly can enact such grants free of re-examination by subsequent Assemblies. There could be no suggestion by anyone that the provisions of R.C. 2323.57 could not be "altered, revoked or repealed by the General Assembly" at any time that body saw fit to do so. Thus, even on its merits, this challenge to the statute is utterly meritless.

that the periodic payments statute is "an unconstitutional cap on future damages" like the one held invalid in *Morris v. Savoy* (1991), 61 Ohio St. 3d 684 [*Br.* at 17]. *Second,* he claims there is "no evidence" of a rational relationship between periodic payments and the statute's "objective", which he insists is solely the reduction of the costs of medical malpractice insurance. [*Id.*, at 15-16]. And *third,* he argues there is no rational basis for the statutes application only to medical malpractice plaintiffs (and only to those who have received large future damages awards), and not to persons injured by other forms of tortious injury. [*Id.*, at 24-29.][2] Each of these arguments is misguided.

A. R.C. 2323.57 does not impose a "cap" on future damages.

Nothing in the statute even suggests that total damages, or any specific classes of damages, are legislatively "capped". In truth, the statute bears no resemblance at all to the "caps" on damages that this Court held unconstitutional in *Morris, supra.*

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2. Plaintiff also contends that the statute must be evaluated under the "strict scrutiny" standard because of his claim that periodic payments impair the constitutional right to trial by jury. [*Id.*, pp 23-24, 30]. As shown below, the statute has *no* impact at all on jury trial rights. It is, moreover, at odds with every decision of this Court addressing the constitutionality of various tort reform enactments, which have unfailingly rejected demands for "strict scrutiny" review. *See, e.g., Morris, supra,* 61 Ohio St. 3d 684; *Mominee v. Scherbarth* (1986), 28 Ohio St.3d 270; *Schwan v. Riverside Methodist Hosp.* (1983), 6 Ohio St.3d 300; *Beatty v. Akron City Hospital* (1981), 67 Ohio St.2d 483; *Denicola v. Providence Hosp.* (1979), 57 Ohio St.2d 115. And it is, finally, unsupported by the lone decision from elsewhere that plaintiff cites as supposedly adopting a "strict scrutiny" test. *See Carson v. Maurer* (N.H. 1980), 424 A.2d 825 (adopting, not "strict scrutiny" but an "intermediate scrutiny test). *See also Bernier v. Burris* (Ill. 1986), 497 N.E.2d 763 (discussing the idiosyncratic character of New Hampshire's approach to equal protection analysis in this area).

Plaintiff insists, however, that the statute should be treated as if it did impose a cap, for two reasons.

First, the amount of future damages is determined in terms of present value, but the statute makes no provision for interest on periodic payments of the amount awarded. Plaintiff says this effectively reduces the amount of the award. Second, he claims that the statute creates a "windfall" reduction in damages for the defendant by terminating the obligation to pay for unaccrued noneconomic losses and medical expenses upon the death of the plaintiff. Neither of these notions has any merit.

As to interest, plaintiff is correct that the statute does not require a trial judge to include in an approved payment plan some provision for interest to accrue on deferred amounts. But it does not forbid such a provision either. In truth, under the statute, the trial court has broad discretion in fashioning a plan. R.C. 2323.57(D)(1)(d). To the extent that liability for interest on periodic payments is appropriate, the court undoubtedly has authority to include provision for it in the plan. And if, as plaintiff suggests, interest is constitutionally required, then one must assume that courts will exercise their discretion in conformity with the constitution and incorporate provisions for interest in any approved plan whenever constitutionally required.

Equally ill-founded is plaintiff's contention that damages are somehow "capped" by the statutory provision that, upon the plaintiff's death, further periodic payments need not be made for medical expenses and noneconomic losses that the plaintiff would not in fact incur. R.C. 2323.57(F)(l). Amazingly, plaintiff characterizes this as the creation of a "windfall" for the defendant. What it actually does, of course, is eliminate the windfall received, not by the defendant or even by the plaintiff,

but by the plaintiffs heirs, when the plaintiff dies sooner than the lie expectancy on which the trier of fact relied in calculating compensation for future losses.

As described in defendant's initial Brief, the inevitable disparity between future losses as projected at trial and as actually incurred is among the most widely recognized deficiencies in the traditional award of lump-sum damages.[3] It should go without saying that a primary goal of any remedial system is *accurate* compensation of the injured party. Plaintiffs contention that, in effect, he has a constitutional right to preserve the *inaccuracies* of the lump-sum judgment system is senseless.

> The object of an award of damages is to make whole a person who has suffered loss. One who has sustained a loss is not entitled to more than just compensation for the injury sustained. [Citations omitted.]
>
> [P]laintiffs' argument is that they have a right to receive a potential windfall . . . . It is true that before the statute was enacted, awards to plaintiffs contained this potential for a windfall, but we do not believe that the constitutional provisions were intended to ensure that this potential for a windfall would be inviolate.

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3. *See, e.g., American Bank & Trust Co. v. Community Hosp. of Los Gatos-Saratoga, Inc.* (Cal. 1984), 683 P.2d 670, 676 (public interest is served by limiting a defendant's obligation to those future damages that a plaintiff actually incurs, eliminating the so-called 'windfall' obtained by a plaintiff's heirs when they inherit a portion of a lump-sum judgment that was intended to compensate the injured person for losses he in fact never sustained").

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Smith v. Superior Court (Ariz. 1992), 831 P.2d 1279, 1282.

The statute provides that payments need not be made for certain losses that are not in fact sustained by the injured party. This "cap" merely limits damages to the amount of the injured party's actual loss. This Court's language in *Morris, supra,* regarding the "double recovery" permitted by the collateral source rule applies equally to the windfall recovery at issue here: "[I]t does not appear to be unreasonable or arbitrary to deny a double recovery. Such a proposition surely does not offend fundamental fairness." 61 Ohio St. 3d at 693.

In short, the periodic payments statute does not "cap" or limit compensation in either of the ways claimed by plaintiff. It does not preclude the payment of interest, and it does not limit damages for future losses. Plaintiff's arguments to the contrary are meritless and must be rejected.[4]

B. R.C. 2323.57 is rationally related to achieving a range of Plainly legitimate legislative objectives.

Plaintiff admits that, under traditional due process and equal protection analysis, a statute must be upheld if it is rationally related to a legitimate governmental objective. [*Br.* at 15-16].

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4. Plaintiff and amicus cite to a number of cases from other states dealing with caps on damages awards. The immateriality of those decisions to the constitutionality of periodic payment legislation is evident from the fact that several of those same states have *upheld* the constitutional validity of periodic payment legislation. *Compare, e.g., Smith v. Dept. of Ins.* (Fla. 1987), 507 So.2d 1080, *and Wright v. Central DuPage Hosp. Assoc.* (Ill. 1976), 347 N.E.2d 736 (holding damages caps unconstitutional) *with Florida Patients Compensation Fund v. Von Stetina* (Fla. 1985), 474 So.2d 783, *and Bernier v. Burris* (Ill. 1986), 497 N.E.2d 763 (upholding periodic payment systems).

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Strock v. Pressnell (1988), 38 Ohio St.3d 207, 214; *Mominee, supra,* 28 Ohio St.3d 270. He mistakenly argues, however, that R.C. 2323.57 violates this standard.

The linchpin of plaintiff's arguments is his claim that the statute "has but one purpose:" to undercompensate injured parties in order to reduce medical malpractice insurance premiums. From that premise, he easily concludes that the statute serves no legitimate legislative objective. He is wrong.

As described above, plaintiff is wrong first in his claim that the statute is designed to undercompensate injured plaintiffs. The statute provides for full and immediate lump-sum awards for all losses incurred prior to the verdict, plus at least $200,000 of damages for losses not yet incurred. The balance of future damages are paid in periodic payments, except for certain future payments that become unnecessary because the loss was in fact never incurred. This provision does not undercompensate; it merely improves the accuracy of compensation.

Plaintiff is also wrong in insisting that the sole purpose of R.C. 2323.57 is to reduce the costs of medical malpractice insurance. As noted in defendants' original Brief, reducing health care costs by reducing insurance costs is plainly a legitimate legislative goal, and it was no doubt among the considerations that led to the statute's adoption. But periodic payment statutes, including those limited to particular classes of tort actions, have never had that has their sole focus.

Periodic payment statutes such as Ohio's are designed, rather, to correct a wide range of deficiencies inherent in the traditional system of lump-sum damage recoveries, including difficulties of calculation, inaccuracy of compensation,

investment risks, premature dissipation of proceeds, and inconsistency with tax policy. *See* Nat. Conf. of Comm'rs on Uniform State Laws, *Uniform Periodic Payment of Judgments Act* (1990), (quoted in defendant's original Brief at 14-15 n. 4).[5]

Plaintiff denies that the statute reflects this range of legislative objectives.[6] Based solely on a citation to an uncodified portion of the act adopting R.C. 2323.57, he insists that the statute's sole purpose is a reduction in malpractice premiums. *See Br.* at 9, *quoting* Am. Sub. H.B. 327, § 4(A). The cited provision, however, says only that stabilizing the marketplace for medical professional liability insurance "is *a* goal of the General Assembly." *Id.* (emphasis added). The quoted provision identifies "*a*" goal, not *the* goal, an identification that, by definition, acknowledges the existence of other legislative goals as well. Those other goals are set forth above, and they are well

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5. *See* Bauer, *Periodic Payment of Judgments in Ohio*, 2 Oh. Civ. Pract. J., no. 6, 158, 159 (purpose of the statute is to avoid "uncertainties and inequities inherent in lump-sum awards"). *Accord:* Darling, *Ohio Civil Justice Reform Act*, p. 150 (1987).

6. Indeed, plaintiff and amicus refuse to even acknowledge the existence of the legislative objectives identified the National Commissioners as well as by various courts and commentators. Instead, they consider the legislation's non-insurance objectives a paternalistic effort to protect injured parties from their own improvidence. *See Brief of Plaintiff-Appellee*, pp. 8-9, 19; *Brief of Amicus Curiae*, p. 7, n. 7. Concerns with accuracy of compensation, with the uncertainties of investment markets, and with tax policy have nothing to do, of course, with protecting anyone from imprudent financial management. Further, legislative concern for the possibility of improvidence by tort victims may be given the pejorative label "paternalism", but the concern for the welfare of others that undergirds much legislation is, in this case, well warranted by the available data regarding the frequent dissipation of lump-sum awards. *See Brief of Defendants-Appellants*, p. 13 n. 3 (citing empirical data on dissipation of lump-sum awards).

known and universally recognized. Plaintiff's monolithic view is wrong.

Finally, plaintiff is mistaken in his claim that " 'there is no evidence [of] a rational connection' " between periodic payment plans and the legislative objectives. *Br.* at 16, (quoting the opinion of the Court of Appeals in this case). That claim merely repeats the error of the courts below in assuming that a statute's validity depends on an empirical demonstration that it has or will achieve its intended objectives. That is not the constitutional law of this or of any other state.[7]

Judgments about the extent of particular problems and about the practicality of various possible solutions are entrusted under our constitutional system to the legislature. Neither this Court nor any other court sits as a "Supreme General Assembly" to review the wisdom, empirical soundness, or efficacy of legislative enactments. *Ohio AFL-CIO v. Voinovich* (1994), 69 Ohio St. 3d 225, 246 (Resnick, J., concurring).

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7. *See American Bank & Trust Co. v. Community Hosp. of Los Gatos-Saratoga, Inc.* (Cal. 1984), 683 P. 2d 670, 679, *quoting Minnesota v. Clover Leaf Creamery* (1981), 449 U.S. 456, 466 (Brennan, J.) (constitutionality does not depend on a court's assessment of the empirical success or failure of the [statute's] provisions. . . . 'Whether in fact the Act will promote [the legislative objectives] is not the question: [it is sufficient] that the [state] Legislature could rationally have decided that [it] . . . *might* [do so] . . . .' " [emphasis in original]).

Moreover, even if it were required, the empirical foundation exists. As noted in a recent study by Citizen Action (hardly a proponent of tort reform legislation), the average cost of medical malpractice insurance (adjusted for inflation) declined by almost 19 percent between 1988 and 1991. UPI Newswire *Group urges against malpractice limits*, May 16 1994. It is hardly implausible to conclude that at least some portion of the decline was directly attributable to the various reform measures (including periodic payment legislation) that were widely adopted in this country in the mid-1980's.

For that reason, an enactment must be upheld unless its provisions are wholly arbitrary or entirely unconnected to advancing the public welfare. Relative to periodic payments, no such showing has been or could be made. The deficiencies in lump-sum awards are well-known. Periodic payments directly address those deficiencies, reducing the likelihood of inaccurate compensation, mitigating investment risks, increasing the probability that compensation will be available when need and affording to tort judgments the same tax advantages that accrue under structured settlements. Neither plaintiff nor amicus curiae has offered any reason to conclude otherwise.[8]

C. R.C. 2323.57 is not unconstitutional in its application only to large verdicts in medical negligence cases.

Plaintiff's final constitutional attack on the periodic payment statute asserts that it is irrational first to apply the statute only to medical malpractice plaintiffs and not to other tort plaintiffs, and second to distinguish between plaintiffs with large future damages and those with lesser amounts.

The first part of this claim has already been addressed in defendant's original Brief. *See Brief of Defendant-Appellant,* at 15-16 n. 5. As shown, it was rational, indeed prudent, to limit the reach of an innovative legislative device to a class of cases in which large future damage awards are common and where there is a high likelihood of insurance with which to fund periodic

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8. Plaintiff relies heavily on the decision in *Kansas Malpractice Victims v. Bell* (Kan. 1988), 757 P.2d 251, apparently unaware that the relevant portions of that decision have been effectively overruled by the Kansas Supreme Court. *See Samsel v. Wheeler Tr. Serv. Inc.* (Kan. 1990), 789 P.2d 541, *and Bair v. Peck* (Kan. 1991), 811 P.2d 1176, 1191. *See Shepards Pacific Citations* (designating *Bell* as having been overruled by *Bair*).

payments. Moreover, as this Court held in *Morris, supra,* the Assembly legitimately focused its efforts at reform in the area of medical malpractice, in view of the genuine concerns about medical insurance costs. 61 Ohio St. 3d at 693, *following Denicola v. Providence Hosp.* (1979), 57 Ohio St. 2d 115.[9]

Similarly misplaced is the claim that it is irrational to distinguish between medical malpractice plaintiffs with large future damages and those with judgments for lesser amounts. A periodic payment system for small future damages awards would be pointless: the costs of administering such a plan could easily exceed the amount of the recovery itself, and concerns with investment risks, future availability of funds, and tax consequences are greatly diminished in significance when the amount in question is relatively small. The statutory distinction between larger and smaller awards thus rests on a straightforward and sensible recognition of real functional and policy differences between the two classes.[10]

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9. Indeed, this Court, in the procedural rules that it has adopted under the Constitution, has embraced precisely the distinction between medical malpractice claims and other forms of tort recovery that plaintiff now claims to be *per se* unconstitutional. *See* Evid. R. 601(D) [special rules governing Competency of expert witnesses in medical claims cases].

10. In *Morris, supra,* this Court suggested that a distinction between larger and smaller claims for noneconomic losses in medical malpractice cases might well rest on false assumptions about the existence and extent of such losses. 61 Ohio St. 3d at 692. Nonetheless, the Court held that legislative "caps" as to larger amounts could not be dismissed as resting on a wholly irrational classification. *Id.* In the case of periodic payments the distinction between large and small plainly rests on a far stronger footing than the distinction at issue in *Morris.* Thus, if the classification at issue in *Morris* survived equal protection scrutiny, a *fortiori* there can be no successful equal protection challenge to the classification at issue here.

Appendix B

PROPOSITION OF LAW NO. 1(B):

R.C. 2323.57 REGULATES ONLY THE WAY IN WHICH JUDGMENTS MAY BE ENFORCED AND DOES NOT INTERFERE WITH A PARTY'S RIGHT TO A JURY DETERMINATION OF DAMAGES. THE STATUTE DOES NOT VIOLATE THE CONSTITUTIONAL RIGHT TO JURY TRIAL. (*Lash v. Mann* (1943), 141 Ohio St. 577, paragraph three syllabus, applied and followed.)

Plaintiff claims that the periodic payments statute denies him the right to trial by jury. This contention rests on two propositions: *first*, that the statute's supposed failure to provide for interest on periodic payments effectively reduces the amount of damages awarded by the jury; and *second*, that the periodic payment of a judgment denies the plaintiff (or judgment creditor) his supposed right of immediate "access" to the damages found by the jury's verdict.

The first of these propositions has been addressed above. Contrary to plaintiff's assertions, the statute does not deny interest on periodic payments and it therefore does not reduce the amount of damages awarded by the jury.

The second part of plaintiff's jury trial claim also lacks merit. Plaintiff's sole authority for his proposition that a plaintiff has an inviolate right of immediate "access" to damages once they have been calculated by a jury is a decision of the Kansas Supreme Court that has since been overruled. *See* note 8, *supra*. This dearth of authority explains why the "decision" of the Court of Appeals in this case was reached by fiat, without explanation, analysis, or even citation.

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The decision is wrong. The statute does not alter in any way the jury's historical and constitutional role in determining and valuing the loss suffered by a plaintiff. The statute provides only for the deferred payment of a portion of the award, as determined by the jury, and the portion deferred relates to compensation for losses that the plaintiff has not yet accrued.

The regulation of when and how money judgments will be enforced has never been a part of the jury's function. Courts in Ohio and elsewhere, for example, have long had the inherent power to temporarily stay execution of money judgments "in an almost infinite variety of circumstances." *Dibert v. Ross Pattern Foundry & Devel; Co., Inc.* (Ohio App. 1957), 160 N.E.2d 862, 863; *Grussell v. Poll* (Super. Ct. 1898), 5 Ohio N.P. 439, 441. The power has been specifically applied at times to defer enforcement of judgments so that a judgment debtor could make satisfaction in installments or periodic payments. *See, e.g., Quality Carpets, Inc. v. Carter* (N.H. 1991), 587 A.2d 254; *Moskin v. Midland Bank & T. Co.* (N.Y. Sup. 1978), 409 N.Y.S.2d 327; *Royal C. Co. v. Wabash* (D.C. Mun. App. 1960), 162 A.2d 493.

Likewise, legislatures have long had and exercised the power to provide for stays, to determine when and against what property judgments could be enforced, and to require judgment creditors to defer collection temporarily. *See, e.g., Home & Loan Building Assoc. v. Blaisdell* (1934), 290 U.S. 398 (legislative moratoria of foreclosures); *Dutt v. Marion Air Cond. Sales, Inc.* (1953), 159 Ohio St. 290 (plenary legislative control of rules governing attachment and enforcement of judgment liens).

These and other limitations on the immediate enforcement of judgments all impair to a substantial degree the ability of a judgment creditor to obtain immediate "access" to the amount of damages a jury has awarded. Yet no court has ever held that the

existence of these limitations impairs the right to trial by jury. In truth, the method and timing with which money judgments are enforced has never been and is not now any part of the jury's role. Periodic payments under R.C. 2323.57, like judicial stays, do not immediate "access" to damages awards for the simple reason that there is no such right.

PROPOSITION OF LAW NO. 2:

> **THE CONSTITUTION PROHIBITS THE AWARD OF PREJUDGMENT INTEREST UNDER R.C. 1343.03 AGAINST A DEFENDANT WHO EXERCISES HIS CONSTITUTIONAL RIGHT T TRIAL BASED ON A GOOD FAITH, OBJECTIVELY REASONABLE BELIEF THAT HE IS NOT LIABLE. A PARTY'S BELIEF THAT HE IS NOT LIABLE IS OBJECTIVELY REASONABLE AS A MATTER OF LAW IF REASONABLE MINDS COULD DIFFER AS TO LIABILITY. (*Kalain v. Smith* [1986], 25 Ohio St. 3d 157 approved and followed.)**

The trial court's award of prejudgment interest departed both from constitutional requirements and from the holding in *Kalain v. Smith* (1986), 25 Ohio St. 3d 157, by punishing defendants' good faith exercise of their constitutional rights to trial and trial by jury.[11] In response to the constitutional argument, plaintiff

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11. Plaintiff deems "novel" the proposition that the statute's interest penalty implicates constitutional rights. *Brief of Plaintiff-Appellee*, p. 31. Plaintiff apparently missed this Court's discussion of that very point in *Kalain, supra*, which set forth the express basis of the Court's holding that the statute was to be construed to avoid the mposition of an unconstitutional penalty. *See* 25 Ohio St.3d 157, at 160 n. 3 ("Appellant argues that, if required to make a monetary settlement offer when (Cont'd)

defends the facial constitutionality of the prejudgment interest statute, and fails to defend its unconstitutional application in this case. *See Br.* at 30-36.

This defense is beside the point: defendants agree that the statute as *construed in Kalain* is constitutional. Indeed, they argue that the *Kalain* holding is constitutionally compelled. The constitutional question before the Court relates to the statute as applied: whether, as happened here, the statute's punitive sanctions for going to trial can properly be imposed when reasonable minds could differ as to the defendant's liability. As described in defendants' original Brief, under the Constitution and under *Kalain,* the answer to that question must be "No". Under this circumstance, the interest sanctions cannot be imposed, because they would punish the defendants' exercise of their constitutional rights to trial and trial by jury.[12]

To the extent that plaintiff addresses this question at all, he does so simply by insisting that there is no constitutional bar to

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(Cont'd)
she has a reasonable belief that she was not liable, her right to a jury trial on the liability issue would be infringed upon because she would be forced to attempt to settle rather than having a jury determine whether she was liable"), and 160 ("Because the standard for a 'good faith effort to settle' does not require parties in all cases to make monetary settlement offers, R.C. 1343.03(C) does not infringe upon a party's right to a jury trial, as is alleged by appellant in this case").

12. "If any infringement on the right to trial by jury under the Seventh Amendment to the United States Constitution, the prohibition against infringing on the right to trial by jury in Ohio is even more strongly stated in Section 5, Article I of the Ohio Constitution." *Vance V. Roedersheimer* (1992), 64 Ohio St. 3d 552, 563 (Douglas, J., concurring and dissenting). The Seventh Amendment of the United States Constitution provides that the "right of trial by jury shall be preserved". In contrast, Article I, Section 5 of the Ohio Constitution provides that "The right of trial by jury shall be *inviolate.*" (Emphasis supplied.)

the imposition of prejudgment interest as compensation for the delays caused by resorting to trial. But even this contention is beside the point.[13]

It is surely true that, as plaintiff contends, the legislature could provide generally for prejudgment interest on all tort judgments. *Br.* at 33, *quoting Hardiman v. Zep Mfg. Co.* (1984), 14 Ohio App. 3d 222. But that power cannot be exercised selectively, particularly not when the selection turns on whether a party has exercised a right conferred by the Constitution.

The General Assembly could have chosen to make defendants generally liable for prejudgment interest, but it did not do so. Instead, it established liability only for those

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13. Plaintiff claims the statute's interference with constitutional rights is permissible because it serves a "compelling state interest." *Brief of Plaintiff-Appellee,* pp. 34-36. The supposedly "compelling" interests are "judicial efficiency," the promotion of settlements, and the compensation of those who are wrongfully denied "prompt and just compensation" for their injuries. *Id.*, p. 31. Not surprisingly, he cites no authority for his view that these interests are sufficiently compelling to warrant the denial of constitutional rights. If they were, these same compelling considerations would justify the elimination of jury trials in their entirety, along with most other constitutional rights regarding judicial procedure.

Of course there are public benefits to be obtained through legislative incentives to the settlement of litigation. Our constitutional system does not permit, however, those benefits to be purchased with the coin of individual constitutional rights. The jury system may not be speedy or efficient, but it is the system that our Constitution provides, and it has assured the integrity and legitimacy of dispute resolution for our society and its predecessors for almost a millennium. The constitutional right to demand judicial resolution of disputes is enshrined in the constitution precisely so that it cannot be taken away by short-sighted and hasty demands for more efficient or more "fair" adjudications. Punishing that right in the interest of "efficiency" is as myopic as any other incursion on such a cherished right.

defendants who insist on a judicial resolution of their case without first making a "good faith" effort at settlement. The liability is punitive, and it punishes the act of proceeding to trial.[14]

As this Court held in *Kalain,* such selective liability can be imposed only when the act of proceeding to trial is not constitutionally protected; and that occurs only when reasonable minds could not differ as to liability, because it is only in that event that the defendant has no right to trial. Plaintiff's contrary assertions simply fail to address these considerations.

Also misplaced is plaintiff's defense of the lower courts' departure from the *Kalain* standard, even apart from constitutional considerations. The trial court held a defendant could avoid liability for failing to make a settlement offer only when "the probability of plaintiff's success [is] nonexistent, or barely marginal at best." *Opinion,* at 13-14 (A. 73-74). That standard is not only indefensible under the Constitution but also violates the holding in *Kalain. Kalain,* 25 Ohio St. 3d 157, syll. ("[i]f a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer").

Obviously, even if, as plaintiff contends, the *Kalain* standard is somehow less rigorous than the constitutional standard

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14. Plaintiff insists that the statutory liability is compensatory rather than punitive. That characterization is inconsistent with the statute itself, which measures liability from the date of the cause of action, rather than from the time of the defendant's supposed unreasonable failure to settle. R.C. 1343.03(C). It is thus not compensation for the defendant's dilatory conduct at all, as this Court has long recognized. *See Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St. 3d 83, 88 n. 7 (describing prejudgment interest under the statute as a "penalty" designed to "penalize" and deter dilatory misconduct).

described above, it bears no resemblance to the trial court's "nonexistent liability" test. Indeed, that test was so far from the mark that plaintiff does not even bother attempting to defend it on its own terms. Instead, plaintiff offers an extended description of the "factual" foundation that he claims should warrant a prejudgment interest award in this case. *Br.* at 36-42.

This effort must fail. Whether prejudgment interest should be awarded is a matter committed to the discretion of trial courts *acting within the appropriate legal standards. Worrell v. Multipress, Inc.* (1989), 45 Ohio St. 3d 241. When discretion is exercised under the wrong legal standard, it is immaterial that it might have been exercised in the same fashion if the correct standard had been applied. *See, e.g., Villella v. Waikem Motors, Inc.* (1989), 45 Ohio St. 3d 36.

Plaintiff's arguments cannot mask the fact that defendants were entitled to a determination of their prejudgment interest liability under a correct legal standard. Since even plaintiff cannot defend the erroneous standard adopted used by the trial court, reversal is required, apart from the constitutional considerations discussed above.

Appendix B

PROPOSITION OF LAW NO. 3:

ON QUESTIONS OF CAUSATION, AN EXPERT MEDICAL WITNESS MAY TESTIFY IN TERMS OF POSSIBILITIES, AND THE EXPERT'S TESTIMONY IS NOT INADMISSIBLE ON THE GROUND THAT THE EXPERT HAS NOT TESTIFIED TO CAUSATION IN TERMS OF A MEDICAL CERTAINTY OR PROBABILITY. (*State v. D'Ambrosio,* (1993), 67 Ohio St.3d 185, approved and followed; Evid. R. 702 applied.)

The trial court excluded certain expert testimony regarding the cause of plaintiff's injuries on the ground that the witness could not testify regarding causation to a "medical certainty" or "probability." Plaintiff does not attempt to defend the legal standard adopted by the trial court. Instead, he invents two alternative justifications for the trial courts action: *first,* that it involved a discretionary refusal to permit the witness to offer trial testimony different from that given on deposition; and *second,* that defendant failed to adequately proffer the excluded testimony. Both of these tactics are vain.

The suggestion that lack of "medical certainty" had nothing to do with the trial court's ruling is flatly contrary to the record. Indeed, the Court of Appeals did not even address it in affirming the judgment below. Plaintiff's motion to exclude the evidence in question quoted the witness's deposition testimony on the possible causes of plaintiff's injury and demanded the exclusion of "any opinion, or attempt[] to suggest" that later surgery had caused the injury. *Record,* p. 188. The stated ground of the motion was not that such an opinion would vary from the deposition testimony, but that the opinion as set forth in the deposition was "grasping for straws." *Id.,* p. 190.

Moreover, when the issue arose during the witness's testimony at trial, the trial court's reasoning was clear. As soon as the witness addressed the possibility of other sources of injury, the court sustained plaintiffs objections and admonished the witness that, in its (mistaken) view, "Doctor, possibilities are not admissible." *Id.*, at 127. *See also id.*, at 128, 131.

In short, the exclusion of the evidence in question was, as the appellate court recognized, directly founded on the trial courts mistaken notion that defendant could offer expert proof regarding other causes only if that proof was framed in terms of "probabilities" or "certainties."

Plaintiff is also mistaken in his view that defendants failed to preserve the error when they did not make a formal proffer of the excluded evidence. Plaintiff claims to derive this conclusion from the settled proposition that the grant or denial of a motion in limine is not itself a ground of appealable error because the court remains free to alter its views when the challenged evidence is presented at trial . *E. g., State v. Grubb* (1986), 28 Ohio St.3d 199, 201-202. That rule, however, does not require a formal offer of proof at trial in order to challenge the exclusion *at trial* of the evidence in question.

Under the Rules of Evidence, claim of error may be made regarding exclusion of evidence only if "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." Evid. R. 103(A)(2). A formal offer of proof is required to preserve error, that is, only if the substance of the excluded evidence is not apparent from the record.

Thus, in this case, plaintiff's position might have some merit

if all that had occurred was the grant of his motion of limine. In that event, there would have been no formal exclusion of the challenged testimony at trial and hence no ruling on which to base a claim of error. In fact, however, the evidence was excluded at trial when the court sustained plaintiff's objections during the witness's testimony. The rule regarding the non-reviewability of rulings in limine is thus immaterial.

The trial court's ruling on the motion on limine does, however, provide the context that made a formal offer of proof unnecessary in this case. The motion in limine sought the exclusion of defendants' "possibility" evidence regarding cause, and set out verbatim the substance of the evidence from the witness's deposition. The motion was granted, and at trial, when the witness was examined regarding other possible causes, the trial court sustained plaintiff's objections on the ground that "possibilities are not admissible." *Record,* pp. 127, 128, 131.

On that state of the record, it cannot seriously be argued that the "substance" of the excluded testimony was unknown to the trial court or was insufficiently reflected in the record. To make such an argument, as plaintiff does, is simply to say that pointless and time-consuming formal offers of proof must be made in every case of excluded evidence, or, even less sensibly, that a formal offer must be made in any case in which evidence is excluded following an earlier grant of a motion in limine.

As the Court of Appeals itself recognized by reaching the merits of the trial court's exclusion of the evidence, neither common sense nor Evid. R. 103 requires any such rule. The error in this case was fully preserved as required by the Evidence Rules, and plaintiff's contrary contentions are wrong.

Appendix B

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals must be reversed, and the cause must be remanded for entry of a periodic payment plan, for the vacating of the award of prejudgment interest, and for a new trial.

s/ Fritz Byers
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